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No. 82-434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORTHERN UTILITIES, INC., a Wyoming corporation,
Petitioner,
v.
KERR-McGEE CORPORATION, a Delaware corporation,
Respondent.

NORTHERN UTILITIES, INC., a Wyoming corporation,
Petitioner,
v.
AMOCO PRODUCTION COMPANY, a Delaware corporation,
and
PHILLIPS PETROLEUM COMPANY, a Delaware corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE STATE OF WYOMING AS AMICUS CURIAE IN SUPPORT OF PETITION OF WRIT OF CERTIORARI

STEVEN F. FREUDENTHAL
Attorney General
STEVEN R. SHANAHAN
Senior Assistant Attorney General
DENNIS M. BOAL
Assistant Attorney General
(Counsel of Record)
State of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

QUESTION PRESENTED

Did the Court of Appeals err in holding that an indefinite price escalator clause in a contract for the intrastate sale of natural gas is not contrary to federal or state public policy.

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INTEREST OF AMICUS

These consolidated cases concern the enforcement of an indefinite price escalator clause in three contracts for the intrastate sale of natural gas in Wyoming. The clause is designated as Article 6(b) in the three contracts and is identical in each case. Northern Utilities, Inc. (Northern) is the purchaser of the gas under each contract and the Respondents, Amoco Production Co., Kerr-McGee Corporation, and Phillips Petroleum Company, are the producers and sellers of the gas.

Northern is an intrastate public utility and its rates, service and earnings are regulated by the Public Service Commission of Wyoming. The gas purchased by Northern from the producers pursuant to the contracts is resold to residential consumers in several Wyoming communities. Ultimately, it is these consumers and citizens of Wyoming who will bear the cost of the gas purchased by Northern from the producers, and it is these citizens who will become the eventual victims of the oppressive escalator clause found in the contracts. As a matter of law, Northern is entitled to recover the cost of the gas through rates which are sufficient to pay the costs of the gas plus a reasonable rate of return on the utilities' investment.

Approximately 85% of the natural gas acquired by Northern for resale to the public is purchased pursuant to the contracts in question. Because of the escalator clause, the cost of natural gas to consumers served by Northern has increased from a price of approximately 28 cents per Mcf in December, 1975, to a price of approximately $2.80 per Mcf in April, 1980, or an increase of ten times in a period of approximately four years. The consumers' monthly gas bill of $30 has been increased to approximately $250, and is still on the rise.

This economic hardship being imposed on Wyoming ratepayers is the result of a price escalation clause, Article 6(b), which the producers claim entitles them to the highest price paid for any gas produced in Wyoming and

sold in interstate commerce, without regard to the fact that the most expensive interstate gas may be the result of a higher heating value, higher pressure base, higher taxes included in the price, or the function of extraordinary price allowances established by the Federal Power Commission. This interpretation by Amoco, Phillips and Kerr-McGee has and will continue to create an inequitable, illegal and oppressive result, causing Wyoming ratepayers to be charged exorbitant prices for the natural gas.

Despite the apparent inequities and economic burden imposed on Wyoming citizens because of the one-sided price escalator clause, the United States Court of Appeals for the Tenth Circuit reversed a District Court ruling which held that Article 6(b) was unenforceable on the grounds that it was contrary to public policy and unconscionable. The decision of the Court of Appeals has a profound impact on thousands of Wyoming consumers and consequently, certiorari should issue.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS IN CONFLICT WITH FEDERAL AND STATE PUBLIC POLICY AND IS CONTRARY TO THE PUBLIC INTEREST.

I. FEDERAL PUBLIC POLICY

The Court of Appeals found that the escalator clause was not contrary to federal energy policy by relying on the Natural Gas Policy Act of 1978, 15 U.S.C. Section 3301, *et seq.* (NGPA). The Court noted that the Act specifically allows the price under intrastate gas contracts to rise through the operation of an indefinite price escalator clause. Because of this acknowledgment in the NGPA, the Court of Appeals seems to conclude that the use of an indefinite escalator clause is in keeping with federal policy

no matter how the clause is conceived or applied.

This conclusion is incorrect and in fact, this case provides a classic example of where an indefinite price escalator clause is being used to frustrate federal energy policy. For example, in 1975, the Federal Power Commission established a special price allowance for the sale of natural gas by small producers. *See*, FPC Opinion No. 742. The price allowance enabled small producers to sell their gas at a higher rate than large producers. The purpose for the "small producer incentive" was to encourage the small producer to develop new supplies of natural gas for the interstate market. None of the producers in this case could have qualified for the incentive if they were selling their gas in the interstate market. Nevertheless, the producers have, by using the price escalator clause, imposed on Wyoming ratepayers the "small producer rate" even though new supplies of gas have not been developed and made available to the interstate market. The producers have instead reaped a windfall at the expense of Wyoming ratepayers. Federal energy policy is not being furthered by the use of the indefinite escalator clause in this case.

The producers are also using the incentives to develop new natural gas provided in the NGPA in a similar fashion. Several provisions of the Act are directed towards encouraging the development of new gas supplies for the interstate market by allowing a higher base price for new gas. None of the gas being provided by the producers pursuant to the contracts would qualify as new gas or the new gas rate. Once again, the producers have, through the indefinite escalator clause, burdened the Wyoming ratepayers with the "new gas rate" even though they have not undertaken any activities here which would provide new gas supplies for the interstate market.

The use of the escalator clause in this situation is not consistent with federal policy. The purpose of the NGPA is to control prices of natural gas while encouraging the development of new supplies. *Pennzoil Co. v. Federal Energy*

Regulatory Commission, 645 F.2d 360 (5th Cir. 1981). Congess did not intend the Act be used as a means for major energy companies to charge exorbitant prices for their gas without taking any additional risk or expense in locating new supplies.

II. STATE PUBLIC POLICY

The Court of Appeals has also misinterpreted the state public policy regarding this matter. The public policy of the state may be found in its constitution and statutes and when they have not directly spoken, then it may be found in the decisions of the Court and in the regular practice of government officials. *Taylor v. State*, 612 P.2d 851, 865 (Wyo. 1980), (Rooney, J. concurring). The State of Wyoming through its Attorney General has appeared in this case at every stage as *amicus curiae* and has expressed the public policy of the State of Wyoming.

From the beginning, the State has maintained that the use of the escalator clause by the producers in this case is unconscionable and contrary to the public interest. As noted by the District Court in its decision, "paragraph 6(b) causes windfall profits and substantially increases the costs to consumers for a commodity without which they may well not be able to live." (Finding No. 21.) The State contends that a contract clause which would bring about such a harsh result is contrary to the public interest and unenforceable. *See e.g., Riddley v. Kraut*, 63 Wyo. 252, 180 P.2d 124 (1947); *Rural Electric Co. v. State Board of Equalization*, 57 Wyo. 451, 120 P.2d 741 (1942).

The Circuit Court observed that the Courts of Equity may, and frequently do, go much further to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. *Virginian Railway v. System Federation No. 40*, 300 U.S. 515, 552 (1936). There is no question the courts have the power to protect the public's interest. The Court of

Appeals in this case has failed to do so and certiorari should be issued.

CONCLUSION

For the foregoing reasons, the State of Wyoming requests that a Writ of Certiorari be issued in this case.

Respectfully submitted,

STEVEN F. FREUDENTHAL
Attorney General

STEVEN R. SHANAHAN
Senior Assistant Attorney General

DENNIS M. BOAL
Assistant Attorney General
(Counsel of Record)

State of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841